

DAVID OPPENHEIMER,)
6 Plaintiff,) 1:18-cv-00272-MR
7 vs.)
8 JAMES SEAN GRIFFIN and)
9 JENNIFER FOWLKES GRIFFIN,)
10 Defendants.)

)

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15 Proceedings in the matter of Cause: 17:101 Copyright
16 Infringement held before the Honorable Martin
17 Reidinger on the 4th day of December, 2019, in the
18 United States District Court, Western District of
19 North Carolina, 309 U.S. Courthouse Building, 100 Otis
20 Street, Courtroom 1, Asheville, North Carolina,
21 commencing at 2:00 p.m. and reported by Sarah G.
22 Pierce, Registered Professional Reporter and Notary
23 Public for the State of North Carolina.

1 APPEARANCE OF COUNSEL

2

3 On behalf of the Plaintiff:

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P R O C E E D I N G S

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3 THE COURT: Good afternoon. We have one
4 matter that is on the calender for this afternoon.
5 That is Oppenheimer versus Griffin which is on for
6 Plaintiff's Motion for Entry of a Default
7 Judgment.

8 I see counsel who I do not recognize. So, I
9 will allow counsel to announce his appearance.

10 MR. LEJUNE: Yes, Your Honor. I'm Dana
11 LeJune.

12 THE COURT: And who do you have with you?

13 MR. LEJUNE: This is David Oppenheimer.

14 THE COURT: Okay. As a preliminary matter,
15 Mr. LeJune, have you provided any notice to the
16 Defendants with regard to today's hearing?

17 MR. LEJUNE: No, Your Honor. They refused
18 all communications and I've never gotten a
19 response from either of the Griffins. The only
20 time I was able to communicate with them -- I did
21 get read receipts from some e-mails before the --
22 well, after the private process server was
23 unsuccessful and before the Court directed FedEx
24 mailing.

25 I did speak to Mr. Griffin on the phone one

1 time. He answered the call but only because I
2 blocked my number, and as soon as I introduced
3 myself he hung up.

4 THE COURT: Well, and I wanted to ask you
5 about that because in what you filed here you
6 included a copy of an e-mail that you sent,
7 ostensibly, to both Defendants that refer to
8 following up on a telephone conversation that you
9 had with at least one of the Defendants.

10 MR. LEJUNE: Correct.

11 THE COURT: It read as though it was a lot
12 more of a communication than simply introducing
13 yourself and then Mr. Griffin hanging up because
14 you refer to responses that you got from him, the
15 indication that he had consulted with an attorney,
16 albeit a cousin or brother-in-law or something
17 like that. So there seems to have been more
18 communication than simply somebody hanging up on
19 you.

20 MR. LEJUNE: You are refreshing my
21 recollection, Your Honor, but I do know that he
22 terminated the call.

23 THE COURT: Well, one of the reasons that I
24 asked about whether there was any notice to the
25 Defendants was the next thing that I want to

1 address is with regard to the service of process
2 issues. And, obviously, if they were here this
3 would be a lot easier. But what I don't want to
4 do, particularly with a Default Judgment that has
5 a little bit of complexity to it like this one
6 does -- it's not your ordinary promissory note
7 type of Default Judgment.

8 I don't want to go through all this and then
9 have somebody come back later and move to set
10 aside the entry of default because they didn't get
11 proper service of process.

12 In looking at the record it appears that the
13 Summons and Complaint was served actually on
14 someone by the last name of Amara, not anyone
15 named Griffin. Do you know who this person is?

16 MR. LEJUNE: I don't have personal knowledge
17 of who Amara is, but my understanding from the
18 private process server is that this is a 60-acre
19 high fenced compound with an electric gate. And
20 that there are at least three structures on the
21 property. One is a business; the other is a home.
22 I believe it's their homestead. And the other is
23 some type of a storage facility.

24 And I believe -- my recollection is it's 60
25 plus acres, and that they -- their business

1 appears to be some type of landscaping and dirt.
2 They sell dirt and different types of dirt and
3 rock. And that there are numerous implements on
4 the -- mechanical bulldozers and such on the
5 property.

6 And I believe that Amara is the receptionist
7 at the business where the Griffins operate their
8 business, which is also on the same 60 acres as
9 their home. At least the real property records
10 reflect that that is their homestead.

11 THE COURT: Well, and you've recounted a lot
12 of what I have gleaned from the record because at
13 least on one of these persons from FedEx refers to
14 this Mr. or Ms. Amaro as receptionist, front desk,
15 which implies that it's a business. But you've
16 served both Defendants at the same location signed
17 for by the same person.

18 Do you have knowledge that both Defendants
19 work at that business? Because, for instance, if
20 you have Mr. Griffin working at the business and
21 his receptionist had signed for it, that wouldn't
22 be good service on Mrs. Griffin.

23 And it seems like that the service questions
24 are very ambiguous based on what I have in the
25 record here. I don't want to piecemeal this. If

1 you have a good explanation to sort of clear up
2 the issues for me, please let me know what it is.

3 MR. LEJUNE: My understanding is that Mr. and
4 Mrs. -- according to the background reports that I
5 did on the two of them, one was Lexis People
6 Finder. It's a pretty comprehensive thing, and
7 the other was a Transunion TLO comprehensive
8 report.

9 Those reflect that they both work at that
10 location for the family business which is, like I
11 said, some kind of dirt -- they sell dirt and
12 landscaping services.

13 THE COURT: So you feel sufficiently
14 confident that either this Mr. or Ms. Amara had
15 the authority to receive service of process for
16 both Defendants at that location?

17 I don't want to go through this process and
18 you come back later and say I really ought to go
19 back and re-serve this thing.

20 MR. LEJUNE: I've tried every way we could,
21 Your Honor. My gut told me that we should have
22 posted the documents on the electric gate, but my
23 recollection is that the Court did not want to
24 order that kind of service, and I believe -- my
25 recollection is that the Court suggested the

1 FedEx, and I did the best I could. We tried every
2 which way. Your Honor, we spent almost \$500 with
3 the process server trying to get service on these
4 folks, personal service.

5 And there are, by the way, there are a lot of
6 notes on the process server's statement. I don't
7 believe I made that an exhibit. If the Court
8 would like, I have marked it Plaintiff's Exhibit
9 Number 5, and I can provide that to the Court.

10 THE COURT: Well, when you are referring to
11 the process server's statement, that's not the
12 statement from FedEx. You are talking about when
13 there was a failed attempt to serve process.

14 MR. LEJUNE: Correct. But there is lots of
15 detail in here about why it failed, and that it's
16 a compound and so forth.

17 THE COURT: Well, if that is your basis for
18 having confidence that you have good service, we
19 can go ahead and go forward. I think you have a
20 *prima facie* record of good service. I just, I
21 want to avoid two things. I want to avoid you
22 coming back a week after I enter the Judgment and
23 saying, now that I've thought about it I want to
24 do it over.

25 And I want to avoid the situation of Mr. or

1 Mrs. Griffin coming in a week after I enter
2 Judgment making a motion to say, move to set aside
3 the entry of Default Judgment for failure of
4 service of process.

5 If you have sufficient confidence that I'm
6 going to avoid both of those problems we can go
7 ahead and proceed.

8 MR. LEJUNE: I have sufficient confidence
9 that you will avoid the first one. And I have
10 probable cause to believe that they will not lift
11 a finger to do anything about this Judgment.

12 THE COURT: Well, then let's move on to my
13 next question because this is one that is of, I
14 guess, procedural significance. That the Motion
15 For Entry of Default Judgment that you filed kind
16 of left me scratching my head.

17 For one thing -- and I don't want to make a
18 big deal out of this but our local rules require
19 that the motion be filed with the attachments that
20 support the motion, and then if you are going to
21 file a brief that that has to be docketed as a
22 separate document, and you put it all in one.

23 I guess the Clerk could have stricken the
24 document and made you do it over. I could have
25 done that too, but we didn't.

1 But what left me scratching my head was not
2 the failure to follow the rules. It was on the
3 face of the document it says Jury Demanded. But
4 then the text of the document presents what is in
5 essence the argument that I would have expected to
6 be presented to the jury if you really wanted a
7 jury.

8 And then one of the attachments was an
9 Affidavit from Mr. Oppenheimer which I would not
10 have expected to see as part of the filing if you
11 were expecting to present this to a jury.

12 So I set this for a hearing based on the
13 presumption that this reference to a jury demand
14 was simply an accident of copy and paste from the
15 complaint.

16 MR. LEJUNE: Absolutely.

17 THE COURT: Okay. So you are here today to
18 present your Motion For Default Judgment for a
19 ruling from the Court as to the evaluation of the
20 judgment, entry of the judgment, determination of
21 the amount of damages, is that correct?

22 MR. LEJUNE: Yes, Your Honor. I would not
23 trouble eight people to do what the Court can do
24 in short order.

25 THE COURT: Well, back years ago doing what

1 we used to call a Default and Inquiry -- in other
2 words, having a jury determine the amount of
3 damages on a Default Judgment was the common
4 practice, and I just thought maybe you were a
5 throwback to the way things were done years ago.

6 Let's move on to some of the substance here,
7 because after reading everything that you had
8 submitted I was unclear about what you were
9 wanting the Court to do. The first question I
10 have has to do with the election that a Plaintiff
11 has with regard to copyright damages, about the
12 election between statutory damages and actual
13 damages under a 504B and C.

14 When I read what you had submitted I read
15 quite a bit like you were starting to present
16 evidence of actual damages, and then you shifted
17 over to arguing about an election for statutory
18 damages, and that could be interpreted two ways.

19 Either you are giving me this information
20 about actual damages so that I can better evaluate
21 where in the range the statutory damages should
22 be; or, that you have not yet made an election as
23 to whether you want actual damages or statutory
24 damages.

25 So let me ask the threshold question. Which

1 of those is what you intend?

2 MR. LEJUNE: The only reason that I put any
3 information in Mr. Oppenheimer's Affidavit and the
4 Motion on what he would have charged for a license
5 for this use, is to give the Court some idea of
6 just one element of the statutory damage range.

7 There are a lot of other elements, including
8 whether the acts were willful or non-willful, but
9 the only reason I included the amount that Mr.
10 Oppenheimer probably could and maybe should have
11 charged for this use the way they used it, and are
12 still using it, Your Honor -- and that's one thing
13 that I wanted to point out to the Court. They
14 have not stopped.

15 THE COURT: Well, that's why you are seeking
16 the injunctive relief as well as damages, correct?

17 MR. LEJUNE: That is correct, Your Honor.

18 THE COURT: With regard to that particular
19 portion of what you have submitted, this \$9,000
20 plus, in reading the Affidavit and in reading what
21 you have submitted you didn't really give me any
22 basis for how that number was arrived upon. It
23 seemed more or less like it was pulled out of the
24 air.

25 If there is a calculation that underlies it,

1 if it was not disclosed, why should that number
2 mean anything to me? Or maybe should I ask, what
3 do you want that number to mean to the Court?

4 MR. LEJUNE: Well, Your Honor, I think like I
5 said, it's just one factor that feeds into the
6 Court's determination or the trier of facts
7 determination as to what an appropriate statutory
8 damage award ought to be. And if the Court wants
9 me to -- I can tell you that Mr. Oppenheimer uses
10 a computer program called Fotoquote and it's
11 F-o-t-o-q-u-o-t-e, and that program has -- I don't
12 know, thousands of variables that you plug in to
13 come up with a license fee that it gives some
14 basis for the license fee.

15 And some of those variables were discussed in
16 Mr. Oppenheimer's Affidavit which were that it is
17 a -- I mean, he's up in a plane, in an airplane,
18 and it's an open cockpit, or somewhat open. And
19 he's hanging out of the upper part of the cockpit
20 to take --

21 THE COURT: That's the part you gave me. I
22 got that part. But, again, it seems to me as
23 though it's a number that's pulled out of the air.
24 And let me go further with my question.

25 Here is one reason why that number did not

1 make a lot of sense to me, because the use to
2 which the Defendants apparently put this
3 photograph was as one photograph out of many on a
4 listing for a rental property, a vacation rental
5 property, to identify the location of the
6 property.

7 In fact, it's this photograph and then there
8 is a circle with an arrow, I believe, that says,
9 "Here is where the house is."

10 And it seems that that is a relatively
11 minimal use. In other words, it is a very small
12 part of what use -- it's a very small part of what
13 the Defendants were doing in listing this
14 property.

15 As a result of that, it seems that for that
16 sort of use, no Defendant, no property listing
17 person would have any interest in paying a \$9,700
18 license fee for a location photo.

19 Therefore, it seemed to me that this number
20 was pulled out of the air, or at least was
21 completely detached from the nature of the use to
22 which the Defendants put it. And, therefore, it
23 became an entirely hypothetical number. It was a
24 number based on the background of the
25 photographer, not the background of the use.

1 MR. LEJUNE: May I respond?

2 THE COURT: So tell me why that number should
3 mean anything to me.

4 MR. LEJUNE: While the photograph is one
5 of -- I don't know, I didn't count them -- 15
6 different photographs, each of the photographs on
7 the website when one clicks on it takes up the
8 whole screen. It opens up. And it's not just a
9 location -- it's not just revealing the location
10 of their rental property in relation to the ski
11 mountain. It is an advertising -- it shows the
12 slopes, and it shows the surrounding area, and it
13 is an enticement for people to rent a house at
14 that mountain. And so it really is more than one
15 of several. It is as important as any of them,
16 and probably as important as the interior photos
17 of the rental property.

18 With regard to why the number that Mr.
19 Oppenheimer derived from to put in there, I'm
20 happy to have -- if the Court wants to ask Mr.
21 Oppenheimer questions about that, or have me ask
22 him to better support that number as being just
23 one part of the statutory damage range, I'm happy
24 to have either one of those happen.

25 THE COURT: Well, this isn't my proceeding.

1 I don't tell lawyers how to try their case. If
2 you want to supplement your record in light of the
3 fact that it has been set for hearing I'll allow
4 you to put a witness on the stand if you want to.
5 I'm not telling you that I expect it. I'm not
6 telling you that I want you to.

7 MR. LEJUNE: Well, it sounds like I ought to,
8 so whenever the Court is ready for me to do that
9 I'm willing.

10 THE COURT: Well, let me go through some of
11 these other questions because it may have an
12 effect on what you want to ask this witness,
13 because part of what you argue in your motion has
14 to do with this so-called scarcity factor. That
15 because of the nature of what was involved in
16 taking this photograph that there is a certain
17 multiplier factor that could or that should come
18 into play.

19 But in terms of showing an aerial shot,
20 whether by photograph or other means, schematic,
21 et cetera, of something that's as popular as the
22 Beach Mountain Ski Resort, you can get on the
23 internet and this photograph is not at all unique.
24 There are several other photographs. I notice
25 that some of them are also taken by Mr.

1 Oppenheimer. But there are several other
2 photographs of the same set of ski slopes.

3 There is a lot of promotional material that
4 is published by the Beach Mountain Ski Resort that
5 show very much the same thing. Under those
6 circumstances, how is there any scarcity? The
7 cases that you cite regarding the scarcity factor
8 seem to be in a very different context of a
9 photograph that was of a particular thing that's
10 very hard to photograph, nobody else had managed
11 to photograph it. It was no longer available to
12 photograph. I can also see it like in the context
13 of, I think the ordinary context of a scarcity
14 factor is the Zapruder film. That one image of
15 that one moment that nobody else got. None of
16 this has any application here, does it?

17 MR. LEJUNE: Well, Your Honor, I would say
18 this. Having not deposed the Griffins, I believe
19 that they picked this image out of all of those
20 others that they could find on the internet
21 because it was the best. Because it best
22 represented what they wanted to depict, to depict
23 to advertise their ski lodge.

24 And the fact that they didn't pick
25 photographs of, or a photograph of Beach Mountain

1 that's on the Beach Mountain website tells you
2 that this image is, I think better than the
3 others.

4 In terms of scarcity it does take some --
5 this image also was taken after a very heavy and
6 rare snow storm in that area. I believe --

7 THE COURT: Wait a minute. In the area
8 around Boone you are calling it a rare snow storm?
9 They are not rare up there. They have snow storms
10 every other week in that area.

11 MR. LEJUNE: I think this one was a
12 particularly big storm. I would have to look at
13 the Almanac. But I would also point out to the
14 Court that the scarcity of a really good
15 photograph, aerial photograph of Beach Mountain
16 has to do with the equipment that's used, the
17 pilot that is flying, and the skill of the
18 photographer.

19 And so while those elements might not be
20 obvious to the Court or to a lay person just
21 casually looking at the picture, I think when
22 compared with the others that might be available
23 on the internet, either for license or not for
24 license, I think this image will stack up as a
25 rare shot.

1 THE COURT: Are there any particular factors
2 that you can point to in this photograph that make
3 it such a rare shot, or that can cause you to look
4 at it as a basis for this one being the best
5 depiction of what is there compared to what else
6 is available?

7 MR. LEJUNE: I think I would let Mr.
8 Oppenheimer speak to that.

9 THE COURT: Okay. Well, I would say it
10 sounds like you are going to be calling him, so
11 we'll go on to that here in just a few minutes.

12 I have several questions that are of a legal
13 nature, but I want to leave those until after I've
14 heard all the evidence. But there is one thing
15 that may play into some evidence that you want to
16 present. And it doesn't have to do with the 504
17 damages but it does have to do with the DMCA
18 damages, and that has to do with the number of
19 violations. Because in going through the material
20 in the file it appeared to me that this photo was
21 posted by the Defendants.

22 It is alleged that it was posted by the
23 Defendants and, therefore, admitted by virtue of
24 their default, but it was posted to 10 websites,
25 not 12.

1 MR. LEJUNE: I think we made a mistake.

2 THE COURT: Okay.

3 MR. LEJUNE: I figured that out just before
4 we started the hearing. I think it's 11 and not
5 12.

6 THE COURT: Okay. I came up with 10, but
7 maybe that is something else that as a matter of
8 fact that you might want to clear up with the
9 evidence.

10 I have other questions that go to
11 interpretations of the law, but I at least wanted
12 to throw those things out before you put any
13 witness on the stand. So if you are wanting to
14 call Mr. Oppenheimer, I would say now would be the
15 opportunity.

16 MR. LEJUNE: Yes, Your Honor. Do you want
17 him to go to the witness box or can he testify
18 from here?

19 THE COURT: No. I want him to come forward
20 to the Clerk's desk to be sworn and then to get up
21 on the witness stand.

22 MR. LEJUNE: Thank you, Your Honor.

23 COURTROOM DEPUTY: Would you put your left
24 hand on the Bible, please, and raise your hand.

25 Do you solemnly swear the testimony you are

1 about to give in the matter now before the Court
2 will be the truth, the whole truth, and nothing
3 but the truth, so help you God?

4 MR. OPPENHEIMER: Yes, I do.

5 THE COURT: You may proceed.

6 MR. LEJUNE: Thank you, Your Honor.

EXAMINATION

8 BY MR. LEJUNE:

9 Q. Mr. Oppenheimer, did you review your
10 Declaration that's attached to the motion this
11 morning?

12 A. Yes.

13 Q. And I just want to be sure that, did you want
14 to make any corrections or changes to that
15 Declaration?

16 A. No.

17 Q. You heard Judge Reidinger. He has some
18 issues. He has some problems with the relative --
19 well, first of all, that he would like more
20 information from you about how you came up with the
21 9,000 plus dollars damage in license fees had you been
22 asked for a license fee. Do you have anything to add
23 to that?

24 A. Fotoquote has a coaching guide. I don't have
25 the program in front of me and didn't review it before

1 coming here today. But it suggests value-added
2 factors for a license, and some of those value-added
3 factors are risk, cost; whether or not it's an aerial
4 photo which is separate from risk which creates a
5 unique photo; whether the photo is used with a
6 watermark which prevents further infringements or
7 downloading infringements; and separate from a
8 watermark, whether or not the work is used with
9 attribution. And those are all value-added factors,
10 which those I believe were relevant in this matter.

11 Also, Photoquote recommends licensing per
12 website, and so this wasn't 9,000 plus dollars for use
13 in one website, but it was use of nearly two dozen.
14 And Photoquote recommends a 10 percent discount after
15 the third website, I believe. So it's not like
16 license it for one website and then, you know, pay 10
17 percent more for each additional website. It's
18 significant to use across the board on every booking
19 agency and travel type website, you know, or quite a
20 few.

21 Q. And did you use a length of time variable to
22 come up to input into the Photoquote?

23 A. Photoquote also considers duration of use,
24 and I can't recall offhand if we had put one or two
25 years in at the time.

1 Q. It was two.

2 THE COURT: Mr. LeJune, let the witness
3 testify rather than you doing it.

4 MR. LEJUNE: Yes, sir. Yes, sir.

5 BY MR. LEJUNE:

6 Q. Do you know if it was more than two years?

7 A. I believe they are still using -- I looked
8 and they are using the photos on at least four
9 websites as of today.

10 Q. And what are those websites?

11 A. One is Travelocity. I think Ebookers, I
12 believe Orbitz, and there is a fourth one.

13 MR. LEJUNE: May I refresh his memory, Your
14 Honor?

15 THE COURT: You may.

16 BY MR. LEJUNE:

17 Q. I believe that's the fourth one.

18 A. Expedia.

19 Q. And did you print these off this morning?

20 A. From my computer, from the internet, not from
21 anything else cached.

22 Q. The Court brought up a point that I think is
23 interesting, and I wanted to see if you had any
24 information on that. Judge Reidinger mentioned that
25 he suspected that no single property, home, or resort

1 owner would ever want to spend 9,000 plus dollars to
2 use a photograph like this one. Have you ever
3 licensed any of your photographs for that kind of
4 money?

5 A. I work a lot on selling prints. That's a big
6 effort in my photography business, and while I do
7 license them for a single image, I don't think I have
8 received that kind of payment. But I would if some of
9 the companies that have infringed had contacted me
10 initially.

11 Q. Okay. Did you look at any other images of
12 Beach Mountain, or have you ever looked at any other
13 images, aerial images of Beach Mountain?

14 A. I tend not to look at other people's work at
15 stuff that I'm going to do. You know, in looking at
16 my photos online after the fact I've seen similar
17 ones, but none come to mind. I rarely look at other
18 people's works that are similar to mine.

19 Q. The Judge had a question. He was wondering
20 is there anything that makes this image special or
21 super special, in your mind, as opposed to others that
22 are on the web?

23 A. I believe that I've honed in a skill and
24 technique to capture the Blue Ridge Mountains in a
25 unique way that very few people have tried, let alone

1 successfully undertaken. The low altitude open canopy
2 aircraft without having glare and reflection and
3 distortion is kind of unique. Not many people do open
4 air aerial photography.

5 This was after a particularly large snow
6 storm, and Boone does get a lot of snow and they do
7 make snow, so the slopes typically have snow
8 throughout the winter. But in this picture the tree
9 tops and the surrounding mountain sides were covered
10 with snow which really added to the effect, you know,
11 because there is a lot of years where it's warm and
12 the trails will have snow but everything else doesn't,
13 and it doesn't look as much like a ski area.

14 And this photo was taken kind of to the
15 front. And it's a tricky lighting situation because
16 it's a north facing mountain and so the sun is
17 backlit, and balancing out the exposure and also the
18 shutter so that there is not a blur makes -- there is
19 a lot of creative decisions that go into creating
20 works like this.

21 And when I'm up there I usually don't see
22 other planes flying around doing -- even in a peak day
23 of fall color this year I was up flying and I didn't
24 see anyone else for two hours.

25 Q. So, I wanted to satisfy the Judge. This

1 morning you and I discovered that there were not 12,
2 as argued in the Motion, different websites where we
3 know it was used. Do you know how many there actually
4 were?

5 A. I didn't realize the discrepancy until after
6 I had left the house and so I wasn't able to go
7 through my records and see if there was one that we
8 left out, and we did have 12 or we miscounted.

9 Q. Well, it's A through K and I count 11.

10 A. I've counted 11 on the document but for some
11 reason I had thought it was 12, so I'm not sure where
12 that discrepancy came in. But I'm certain from
13 looking at the Declaration and reviewing the websites
14 that those are 11 distinct, different websites.

15 And we had a concern that some of these might
16 be unrelated listings but they showed the inside of
17 the same house, so it was unlikely that it was a
18 different property and a different person.

19 Q. Okay. I think that's all I have for you.

20 EXAMINATION

21 THE COURT: I want to follow-up on a couple
22 of things, Mr. Oppenheimer. First on this issue
23 of the website, on the websites that are listed in
24 your Affidavit, of the 11 that are listed, A
25 through K, three of them are on the same website,

1 homeaway, with almost identical information. Is
2 that three times that the photo is posted on the
3 same listing or are those different listings?

4 THE WITNESS: Can I grab my Declaration?

5 THE COURT: Mr. LeJune, if you would please
6 hand a copy to Mr. Oppenheimer.

7 MR. LEJUNE: May it please the Court.

8 THE COURT: I'm looking at paragraph 6 of
9 your Declaration where it has subparts H, I and J.

10 THE WITNESS: I've made a mistake here, and
11 those are image URLs not actual listing URLs, and
12 I apologize to the Court for that mistake.

13 THE COURT: So there are nine that you are
14 identifying, is that correct?

15 THE WITNESS: I'm counting eight complete
16 different websites that displayed the work. I
17 apologize again.

18 There is booking.com, vrbo.com,
19 rentbyowner.com, expedia.com, travelocity.com,
20 ebookers.ie, j2ski.com and homeaway.com, and I did
21 not catch that those were image URLs.

22 THE COURT: The only thing I wanted to
23 follow-up on is this Photoquote software. Have
24 you ever used that Photoquote software to arrive
25 upon an amount in an agreement for a license for

1 one of your photographs?

2 THE WITNESS: I think I'm understanding you
3 correctly. Have I used it in my business practice
4 to establish licenses?

5 THE COURT: Well, my question is narrower
6 than that. Have you ever used that software to
7 come up with a licensing value that was then
8 placed into a licensing agreement where the
9 licensee agreed to that figure?

10 THE WITNESS: Not that I recall. It's
11 usually negotiated, but I use that as a starting
12 point.

13 THE COURT: Okay. Thank you.

14 Mr. LeJune, do you have anything else that
15 you want to follow up with with Mr. Oppenheimer?

16 MR. LEJUNE: I don't believe so, Your Honor.
17 Thank you.

18 THE COURT: Thank you, Mr. Oppenheimer. You
19 may return to your table.

20 Mr. LeJune, I mentioned earlier that I still
21 had some questions of a legal nature. The first
22 one has to do with 504 damages. Am I correct to
23 understand that the award of 504 damages, whether
24 actual damages or statutory damages, would be one
25 one award of damages as jointly and severally

1 against both Defendants?

2 MR. LEJUNE: Correct. One statutory damage
3 award is allowed per work infringed not -- unlike
4 the DMCA, it's not per iteration of infringement.

5 THE COURT: And since it was eight work
6 infringed by Mr. and Mrs. Griffin acting in
7 concert, it would be one award and they would be
8 jointly and severely liable, and that's what you
9 are seeking, correct?

10 MR. LEJUNE: Yes, sir.

11 THE COURT: And I think you partially
12 answered this a moment ago with regard to the
13 DMCA, and that is even though it's the same image
14 that was posted to each of these different
15 websites, do I understand correctly that it is
16 your contention that each posting to a separate
17 website therefore constitutes a separate violation
18 entitling Mr. Oppenheimer to a separate award of
19 damages under the DMCA?

20 MR. LEJUNE: Yes, sir, that is I believe a
21 correct statement of the law in every circuit.
22 And so that the removal of the digital copyright
23 management information is probably more important
24 and more damaging to Mr. Oppenheimer than had they
25 cropped out his circle C or left it completely

1 intact.

2 I probably should have asked him this but my
3 understanding, Your Honor, is that the copyright
4 management information he puts in the digital
5 images that has such things as his name, his
6 mailing address, his website address, his e-mail
7 address, it has a lot of information there so that
8 he doesn't lose control of his photograph.

9 We've had -- with Mr. Oppenheimer, in fact,
10 we've had cases where downstream infringers all
11 claimed innocent infringement because the works
12 had no indication that they were protected by
13 copyright because his information was cropped out
14 and removed from the digital CMI.

15 And it's especially true of realtors.
16 Realtors tend to like to use these photographs
17 that they get off the internet to sell property,
18 and they will remove everything and crop it down
19 so that -- and it goes into the MLS and it just
20 goes wild because -- and some of the realtors
21 don't even know how to call it back or get it off
22 of there. And so that's a real problem with the
23 internet and how's easy is to right click and
24 take.

25 THE COURT: It seems like realtors would know

1 very easily how to get it off of there simply by
2 selling the property and making it unavailable.

3 MR. LEJUNE: Right. I have had one case
4 where Carolina MLS is a separate entity from the
5 national MLS, and the lawyer that was defending
6 the infringer simply could not get them to take it
7 down. It went on for months, and I don't know why
8 that is, but the realtors themselves could not get
9 it down with key strokes.

10 THE COURT: With regard to there being a
11 separate award of damages under the DMCA for each
12 separate posting or posting to a separate website,
13 would you argue that those amounts should be the
14 same, or is there like a decreasing sanction?

15 I don't want to say a decreasing value
16 because that's not what DMCA is trying to measure.
17 But is there a decreasing sanction as there are
18 more violations?

19 MR. LEJUNE: I haven't thought about it, Your
20 Honor. I can't really comment on that. I would
21 suspect that they all should be the same because
22 it is a penalty for the act of removal and
23 distribution, and I just don't see what the
24 argument would be for reduction.

25 If we knew in time when the first one got on

1 VRBO or whatever, and each one successively in
2 terms of the chronology, if that were possible,
3 perhaps the latest one perhaps should be a lesser
4 penalty. But I don't know how to determine the
5 chronology of postings on these websites.

6 Sometimes the internet archive that was
7 called the Wayback Machine, one can determine that
8 but it doesn't -- it's not very accurate. It
9 doesn't crawl every website every day, and so you
10 might be able to pin it down to a 30 or 60-day
11 period but you might not. Probably would not be
12 able to for every one.

13 THE COURT: Okay. I think you have covered
14 everything that I wanted to ask you, and of course
15 asking questions was my whole reason for setting
16 this for hearing. But you have covered everything
17 that I had in my notes that I wanted to cover so
18 if you have something else that you want to add
19 this is your opportunity.

20 MR. LEJUNE: Your Honor, the only thing I
21 would say is that in almost 36 years of practice,
22 and I'm a litigation practice, I have never had so
23 much trouble getting a Defendant served, even
24 after communicating with them that, you know, we
25 are not going to just forget about it. We are

1 going to go forward with a lawsuit and we are
2 going to get a Judgment.

3 I just never have spent this much time
4 getting to the point where we are now. And I have
5 never tried to collect a Judgment in Florida, but
6 I understand it's more a debtor state than even
7 Texas is, and so --

8 THE COURT: Under the circumstances here
9 that's not your problem because you have the
10 property in North Carolina to go after.

11 MR. LEJUNE: One never knows what the
12 mortgage -- how mortgaged up the property is. And
13 I've tried to figure that out and haven't been
14 able to yet. And I suspect I will do post
15 Judgment discovery, and maybe subpoena the lender,
16 but I understand Florida is a difficult place to
17 collect a Judgment.

18 And this property as far as I can tell is the
19 only property that this couple owns in the State
20 of North Carolina.

21 So thank you for taking your time to hear us
22 out, Your Honor, and I have a new respect for
23 Judge Reidinger. I didn't expect to argue or
24 answer any questions. Usually it's just you file
25 the documents and you get a Judgment. So, I

1 appreciate the Court giving us this time.

2 THE COURT: If I have a reputation at all it
3 is the reputation of always having a hundred
4 questions, so that's what you got today.

5 MR. LEJUNE: I know that now. Thank you,
6 Your Honor.

7 THE COURT: Thank you for your presentation.
8 I appreciate all the time that you've put into
9 this.

10 Marshall, that's the last item that we have
11 on the calendar for today, so if you could recess
12 us until further call.

13 COURTROOM MARSHALL: All rise, please.

14 This Honorable Court stands in recess until
15 further call. God save this United States and
16 this Honorable Court.

17 (Proceedings concluded at 3:00 p.m.)

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C E R T I F I C A T E

2 NORTH CAROLINA

3 HENDERSON COUNTY:

4

5 I, Sarah G. Pierce, RPR, and Notary Public in
6 and for the State of North Carolina, do hereby certify
7 that on December 4, 2019, that the foregoing
8 Proceedings was taken by me in stenotype and
9 thereafter reduced to typewritten form by me; that the
10 foregoing is a true record of the Proceedings and
11 testimony given by the witness.

12 I further certify that I am not of kin or
13 associated with any of the parties to this action or
14 their counsel and that I am not interested in the
15 events thereof.

16 This the 10th day of March, 2020.

Sarah G. Pierce

Sarah G. Pierce, RPR
Notary Public Number 201532200163
My Commission Expires
November 16, 2020.

21

22

23

24

25

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